United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

ORIGINAL

No. 75-4089
No. 75-4121

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4089

AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioners,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,

Intervenor,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

(Caption continued on inside front cover)

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On Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board.

REPLY BRIEF FOR THE AMERICAN BROADCASTING COMPANIES, INC., CBS, INC. AND NATIONAL BROADCASTING CO., INC.

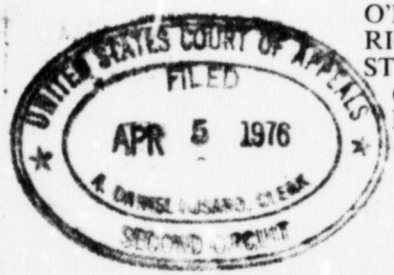

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TABLE OF AUTHORITIES CITED

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I.

Preliminary Statement.

The Networks agree with and adopt the arguments advanced in the Association's Reply Brief. This Reply Brief is therefore limited to a discussion of certain selected issues and erroneous arguments advanced in the Respondent Guild's Opening Brief.

II.

Argument.

A. The "Rank-and-File Struck Work" Exception in Florida Power.

As set forth at length in the Networks' Opening Brief (pp. 21-26), the holding of the Supreme Court in *Florida Power & Light Co. v. I.B.E.W., Local 641*, 417 U.S. 790 (1974), was based entirely on the distinction drawn between the performance of normal supervisory duties and the performance of rank-and-file struck work. However, the Guild's first line of defense herein is to ignore the fact that it was the Supreme Court and the Court of Appeals for the District of Columbia,[1] *not* employers or the National Labor Relations Board, which introduced the "rank-and-file struck work" exception to the already developed Section 8(b)(1)(B) law. The Guild labels what is in fact Supreme Court doctrine as "worthy of a sophist but not of the Board," because, the Guild argues, "*in both cases* [when the disciplined supervisor confines his efforts to management duties and when he also does struck work] *the employer is deprived of the supervisor's 8(b)(1)(B) services.*" (Guild's Opening Brief p. 15; emphasis in original.) The em-

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[1] *I.B.E.W., Local 641 v. NLRB*, 487 F.2d 1143 (D.C. Cir. 1973).

ployers in *Florida Power* made this same argument to the Supreme Court. Whatever the merits of the argument may be, it was rejected by a majority of the Court. As Justice White stated in his dissenting opinion in that case:

> "Nothing in the language or legislative history of the statute [Section 8(b)(1)(B)] contradicts the conclusion that
>
> '[w]hen a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline *equally* interferes with the employer's control over his representative and *equally* deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his "normal" supervisory duties.' 159 U.S. App. D.C., at 305, 487 F.2d, at 1176 (dissenting opinion)." 417 U.S. at 814-815.

In short, the Guild is trying in this case to *expand* the Supreme Court's "rank-and-file struck work" exception to Section 8(b)(1)(B) into a "crossing the picket line for any purpose" exception, and it is urging this Court to do so on the theory that the *narrower* exception created by the Supreme Court was ill conceived. It is submitted that the parties hereto, the Board, and this Court must follow and apply the distinction between performing normal supervisory duties and performing rank-and-file struck work as established by the Supreme Court in *Florida Power*, and that the Board's subsequent decisions, including the one under consideration here, have done precisely that.

In addition to the fact that the Guild's attack upon the "rank-and-file struck work" exception was directly rejected by the Supreme Court, the Guild's argument totally ignores the distinction between supervisory and non-supervisory duties that is firmly embedded in the National Labor Relations Act. Section 2(3) of the Act, 29 U.S.C. § 152(3), specifically exempts supervisors from the definition of employee, evidencing a Congressional purpose to "make the [supervisor's] obligations to the employer paramount." *Carpenters Dist. Council of Milwaukee v. NLRB*, 274 F.2d 564, 566 (D.C. Cir. 1959). Hence, when a supervisor is acting in a purely supervisory capacity, as in the instant case, ". . . he is a representative of management, and as such he should be immune from union discipline." *I.B.E.W., Local 641 v. NLRB*, 487 F.2d 1143, 1157 (D.C. Cir. 1973), *aff'd sub. nom. Florida Power & Light Co. v. I.B.E.W., Local 641*, 417 U.S. 790 (1974). Accordingly, it is only when a supervisor performs rank-and-file struck work that he loses his status as a management representative and becomes subject to union discipline.

The Guild's Opening Brief further argues at some length (pp. 15-16 and p. 20, n. 17) that the Ninth Circuit, in *NLRB v. San Francisco Typographical Union No. 21*, 486 F.2d 1347 (9th Cir. 1973), *cert. den.* 418 U.S. 905 (1974), went beyond the "rank-and-file struck work" exception subsequently created by the Supreme Court in *Florida Power*, since, according to the Guild, the supervisors in *San Francisco Typographical Union No. 21* did not perform struck rank-and-file work. Moreover, the Guild contends that the Supreme Court's denial of certiorari in *San Francisco Typographical Union No. 21* somehow implicitly expands the doctrine

of *Florida Power.* (Guild's Opening Brief, p. 29 n. 17.) This argument manifests a misreading of the Ninth Circuit's opinion. The Ninth Circuit's Opinion on Petition for Rehearing makes it abundantly clear that *San Francisco Typographical Union No. 21* fits directly within the parameters of *Florida Power,* since in both cases the disciplined supervisors performed struck rank-and-file work:

> "In its petition for rehearing the Board has asked us to reconsider our decision that Section 8(b)(1)(B) does not prevent unions from fining supervisors *who perform rank-and-file work behind a picket line . . .*
>
> ". . . That Court [the D.C. Circuit] found, as we did [in the case in chief], that although strike-breaking may be in the employer's economic interest, supervisors *who perform rank-and-file struck work* are not representing the employer 'for the purposes of collective bargaining or the adjustment of grievances' under Section 8(b)(1)(B)." 486 F.2d at 1350. (Emphasis added.)

In sum, there is simply no basis in either precedent or logic for the Guild's attempt to expand the "rank-and-file struck work" exception created by the Supreme Court in *Florida Power.*

B. The Guild's Motive or Object Is Irrelevant.

The Guild next argues at length that its conduct in threatening, coercing, disciplining and blacklisting the hyphenates falls outside of the literal proscription of Section 8(b)(1)(B) because the sole "motivation," "intent" and "object" of the Guild was "strike solidarity" and was *not* to punish the hyphenates for the exer-

cise of grievance resolving or collective bargaining functions. However, the Guild's intention is irrelevant; it is the conduct itself and its actual or foreseeable consequences which determines liability. *Typographical Union No. 16,* 216 NLRB No. 149, 88 LRRM 1378 (1975); *Typographical Union No. 6,* 216 NLRB No. 147, 88 LRRM 1384 (1975).

Not only has the Board determined that motive is irrelevant in Section 8(b)(1)(B) cases, as the above-cited cases indicate, but also the Supreme Court has made similar holdings with respect to other Section 8 offenses, which, like Section 8(b)(1)(B), involve restraint and coercion. For example, in *I.L.G.W.U. v. NLRB,* 366 U.S. 731 (1961), the Court upheld the Board's finding of Section 8(a)(1) and 8(a)(2) violations on the part of a company which had bargained with a union that did not represent a majority of its employees, despite the company's good faith belief to the contrary. The Court stated:

> "We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved." 366 U.S. at 739.

Similarly, in *NLRB v. Burnup and Sims, Inc.,* 379 U.S. 21 (1964), the Court held that an employer violated Section 8(a)(1) for discharging employees engaged in union activity, despite the employer's good faith and objectively reasonable belief that the employees had threatened to dynamite his plant.

Moreover, the Guild's argument regarding its intent is totally inconsistent with the Supreme Court's approach to Section 8(b)(1)(B) in *Florida Power.* The Guild's asserted reason for the discipline it imposed—"strike solidarity"—is the natural and typical reason that would

be given by virtually any union which disciplines members for crossing a picket line, including the unions involved in *Florida Power*. The Supreme Court would have had no need to make the careful distinction it did between the types of work performed by supervisors during a strike if the intent of the unions had been a relevant or controlling factor.

Hence it is submitted that a respondent's mental state is clearly not relevant in "coercion" cases. Accordingly, the intention, purpose or motive of the Guild's conduct has no bearing on the instant case. The only relevant inquiry is the actual or foreseeable result of the conduct. The Guild's entire course of conduct, from its Strike Rules to its threats to its trials and fines, was clearly and unequivocally designed and executed to deprive the affected employers totally of the services of certain personnel who had been previously selected and designated by the employers as representatives for purposes of collective bargaining and resolution of grievances. The clearly foreseeable impact of such conduct, if successful, would be to force the employers to select some other, different management representatives, or to operate without any such managerial services. As the Administrative Law Judge and Board below so correctly concluded, "It is clear that Respondent's action in this case violated the plain meaning of the statute without the necessity of resort to statutory exegesis." (Appendix [hereinafter "A"], p. 99.)

C. Story Editors Are Section 8(b)(1)(B) Representatives.

There is ample testimony in the record that story editors have the initial authority to adjust grievances of writers. (Transcript of Hearing Before the Administrative Law Judge [hereinafter "Tr."], pp. 69-70; 165-

66; 471). For example, when executive producer John Mantley was directly asked what authority a story editor has with respect to resolving grievances of writers working under his direction, he responded:

> "he has a lot of authority in that respect, but in the past few years, there have been very few—serious—in fact, I can't think of a single serious disagreement between the writer and members of our production staff.
>
> *But certainly if those things arise, it is within his province to resolve them.*" (Tr. p. 571; emphasis added.)

Despite such evidence of the story editor's authority, the Guild argues that since a story editor does not have the *final* authority to resolve contested grievances, he is not a Section 8(b)(1)(B) representative. Such an argument ignores the many instances in which the story editor and the writer reach agreement between themselves as to the resolution of a work-related dispute. (Tr. p. 70, line 18.) A story editor should certainly not be deemed to be any less of a grievance adjustor simply because he *successfully* adjusts grievances at his own level. *San Francisco-Oakland Mailer's Union No. 18*, 172 NLRB 2173, 2176 (1968).

Moreover, accepting the Guild's argument would lead to ludicrous consequences. Thus, to take the example of the assignment of writing credit (Guild's Opening Brief, pp. 23-24), under the Guild's theory the only Section 8(b)(1)(B) management representatives for grievances regarding this issue would be the Guild itself, because, despite several intermediate decisions and possible resolutions of this issue by various supervisory personnel, the Guild has the final authority to determine which of its members is alloted credit. Sim-

ilarly, in the typical contract under which unresolved grievances are finally settled through arbitration, the arbitrator would be the sole Section 8(b)(1)(B) representative. To state the logical result of the Guild's theory is to refute the theory.

III.

Conclusion.

For all of the foregoing reasons, it is submitted that the Board's decision finding violations of Section 8(b)(1)(B) by the Guild was based on substantial record evidence and has "a reasonable basis in law," *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). As such, it should be enforced.

Dated: March 31, 1976.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On March 31, 1976, I served the within

REPLY BRIEF FOR THE AMERICAN BROADCASTING COMPANIES in re: "American Broadcasting Companies vs National Labor Relations Board", in the United States Court of Appeals for the Second Circuit, No. 75-4089, 75-4121;

on the attorneys in said action, by placing 2 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 31, 1976, at Los Angeles, California

Joan Drennen

Service of the within and receipt of ~~a~~ copy thereof is hereby admitted this 31st day of March, A.D. 1976.

Copy of Service Enclosed